

United States Senate

WASHINGTON, DC 20510-2309

August 4, 2011

Chairman Julius Genachowski
Commissioner Michael J. Copps
Commissioner Robert M. McDowell
Commissioner Mignon Clyburn
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

The Honorable Christine A. Varney
Assistant Attorney General for Antitrust
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Chairman Genachowski, Commissioners, and Assistant Attorney General Varney:

As you know, I opposed Comcast's acquisition of NBC Universal and urged both the Federal Communications Commission (FCC) and the Department of Justice (DOJ) to block approval of this deal. Although the deal was ultimately approved, the Commission recognized that there were significant competitive consequences to a merger of this magnitude. To address these consequences, Chairman Genachowski stated that the Commission had "adopted strong and fair merger conditions to ensure this transaction serves the public interest." These conditions, and the conditions of any media/telecommunications merger approved by the FCC, only have meaning if they are vigorously and aggressively enforced. It is now six months since this deal was approved, and a complaint has already been filed by Bloomberg, L.P. regarding Comcast's refusal to place Bloomberg's financial news channel in the same "neighborhood" as other cable news networks, including Comcast's CNBC and MSNBC. I fear that Comcast's alleged attempt to maneuver around the neighborhooding condition in the merger order is only the beginning of a series of lengthy and expensive battles over conditions, and I urge the Commission to act promptly if Comcast is in violation of this or any other conditions in its merger order.

In its order approving the merger, the Commission stated: "we require that if Comcast now or in the future carries news and/or business news channels in a neighborhood, defined as placing a significant number or percentage of news and/or business news channels substantially adjacent to one another in a system's channel lineup, Comcast must carry all independent news and business news channels in that neighborhood." At the time the Commission adopted this condition, it recognized that Bloomberg was a close competitor of CNBC and that Comcast would have an incentive to disadvantage this network to gain advertising revenue and subscribers. According to the record before the Commission, there are numerous markets where Comcast groups a significant number and percentage of news and business news channels in adjacent channel positions. In downtown Minneapolis, for example, Comcast carries four news networks on channels 60 to 63: CNBC, CNN Headline News, MSNBC, and Fox News, but it has relegated Bloomberg to channel 251.

It is also worth noting that in a program carriage dispute between Comcast and the Tennis Channel, the FCC's Enforcement Bureau recently found that Comcast engaged in "deliberate

anticompetitive conduct” against the Tennis Channel and in favor of its channels, Golf Channel and Versus. The Enforcement Bureau stated that the gravity of this discriminatory conduct warrants a forfeiture of the maximum amount permitted for this type of continuing violation, and it recommended that “the Presiding Judge should either require Tennis Channel to be carried on a channel proximate to Golf Channel or Versus... or should require Comcast to create a ‘sports neighborhood’ (similar to the ‘news neighborhood’ required by the Comcast Merger Order) and require that Tennis Channel be located in the same neighborhood with Golf Channel and Versus.” In light of this finding of discriminatory program carriage practices, I hope the Commission will seriously examine the allegations in Bloomberg’s complaint.

I recognize that the language in the Commission’s order is somewhat ambiguous as to the definition of “neighborhood,” but Comcast’s decision to challenge this condition rather than negotiate with independent news and business news channels to reach an agreement is unfortunate. I fear it indicates a larger strategy to litigate over conditions language, rather than attempt to implement the conditions in good faith. Moreover, Comcast argues that the neighborhooding condition is prospective and should only apply if Comcast engages in neighborhooding in the future. This is concerning, especially since it portends that Comcast intends to challenge any condition that should have been implemented at the time the Commission issued its order. This raises significant concerns regarding Comcast’s interpretation of other less-straightforward conditions.

The Comcast-NBCU merger was unprecedented in its size and scope, and there are many conditions that were imposed to promote the public interest and to foster competition that are not as easily defended or litigated as Bloomberg’s dispute. I am concerned that small online video distributors and independent channels may not have the resources to file a relevant complaint, and there may be no known constituencies or public interest groups with sufficient resources to police Comcast’s efforts to wiggle around the Commission and DOJ’s carefully crafted conditions, as well as Comcast’s voluntary commitments.

We have seen a trend over the last two decades of FCC and DOJ acquiescence to large media/telecommunications mergers. Many of these mergers have been sold to the public based on the strength and number of conditions that are imposed on the transaction. But conditions mean absolutely nothing if the corporation cannot be trusted to implement them in a full and transparent manner and if there is minimal enforcement of the corporation’s efforts to skirt the requirements of the deal.

I urge the Commission to take a close look at this dispute and to act expeditiously if Comcast is in violation of the neighborhooding condition set forth in the FCC’s order. More importantly, I urge the Commission and DOJ to proactively investigate and monitor Comcast’s compliance with all of the terms of this merger to ensure the company is adhering to both the letter and spirit of the deal. Although the length of time on the Comcast-NBCU conditions was significant, much of that time can and will be lost if each alleged condition violation must be investigated and litigated via a protracted complaint process. If the Commission does find a violation in this instance, I hope the Commission will consider extending the length of time of this condition to match the date that Comcast came into compliance. This will send a strong message that any delays that occur as a result of litigation over language in the order must be

legitimate, and Comcast cannot gain time through these sorts of delays. I also urge you to carefully consider approving another large merger contingent on significant conditions without also considering your agencies' ability to comprehensively monitor and enforce them.

Thank you for your prompt attention to this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Al Franken", with a large, sweeping flourish extending to the right.

Al Franken
United States Senator